

MEMORANDUM

TO: City Council

FROM: Gregory P. Einhorn, City Attorney

SUBJECT: Review of Potential Amendments to BMC Provisions Regarding Abatement of Nuisance: Medical Marijuana

DATE: March 13, 2012

1. Background

The current BMC prohibits the cultivation of Medical Marijuana (MM) where visible and odiferous. The BMC also prohibits MM cultivation, except in a “fully enclosed and secure structure.” Council has requested proposed amendments to the BMC making the regulation of cultivation more clear and explicit.

Proposed code revisions were presented for discussion at the Council’s January 23 and February 27 meetings. The Council proposed further revisions:

- (1) Cultivation prohibited from 300 feet to 500 feet of school, churches and parks.
- (2) Elimination of the greenhouse provision.
- (3) Definitions and criteria of a detached accessory structure placed within the MM measure itself.
- (4) Intra-city staff cooperation and information sharing provision.

2. Proposed Ordinance

A proposed ordinance setting forth these changes is presented for a first reading or for further direction.

Cultivation may be undertaken by the patient or caregiver at the plaintiff’s residence, but is limited to a secure structure that is separate and apart from the residence.

Violations of the cultivation protocol are deemed nuisances and may be abated.

/mk

ORDINANCE NO. 395

**AN ORDINANCE OF THE CITY OF BIGGS
AMENDING CHAPTER 6.25 (HEALTH AND SAFETY AND
NEIGHBORHOOD NUISANCE
ABATEMENT) OF THE BIGGS MUNICIPAL CODE REGARDING
MEDICAL MARIJUANA CULTIVATION**

WHEREAS, the City Council of the City of Biggs, pursuant to Chapter 6 of the Biggs Municipal Code, hereby intends to regulate the cultivation of marijuana for medical purposes, including but not limited to, regulations as to location of the cultivation, size of the area used for cultivation, and the use of fencing or other screening and security structures, to accommodate the needs of qualified patients and their caregivers, and in furtherance of the public necessity, convenience and general welfare. Nothing in these Sections shall be construed to authorize any use, possession, cultivation, or distribution of marijuana for non-medical purposes; and,

WHEREAS, the measures herein are established to regulate Medical Marijuana cultivation in a manner that mitigates potential impacts on surrounding properties and persons, and that is in conformance with the provisions of California Health and Safety Code Section 11362.5 through 11362.83; and,

WHEREAS, the provisions of these Sections shall apply to all persons and businesses described herein whether the activities described herein were established before or after the effective date of this Section; and,

WHEREAS, in 1996, the voters of the State of California approved Proposition 215 which was codified at California Health and Safety Code Section 11362.5, and entitled "The Compassionate Use Act of 1996" ("the Compassionate Use Act" or "CUA"); and,

WHEREAS, the intent of the Compassionate Use Act was to enable persons who are in need of marijuana for medical purposes to obtain and use it under limited, specific circumstances, without being subject to criminal prosecution under certain state statutes; and,

WHEREAS, on January 1, 2004, Senate Bill 420, codified at California Health and Safety Code Sections 11362.7 et seq. and entitled "The Medical Marijuana Program," ("MMP") became effective to clarify the scope of the Compassionate Use Act; and,

WHEREAS, California Health and Safety Code Section 11362.83 expressly allows Cities and Counties to adopt and enforce ordinances that are consistent with Senate Bill 420; and,

WHEREAS, the City of Biggs Police Department, City residents and other public entities have reported adverse impacts from Medical Marijuana cultivation, including disagreeable odors; increased risk of burglary and other property crimes, and acts of violence in connection with the commission of such crimes or the occupants' attempts to prevent such crimes; and,

WHEREAS, the creation of persistent strong odors as marijuana plants mature and flower is offensive to many people and creates an attractive nuisance, alerting persons to the location of valuable marijuana plants and creating an increased risk of crime; and,

WHEREAS, the indoor cultivation of substantial amounts of marijuana also frequently requires excessive use of electricity, which often creates an unreasonable risk of fire from the electrical grow lighting systems used in indoor cultivation; and,

WHEREAS, children are particularly vulnerable to the effects of marijuana use, and the presence of marijuana plants has proven to be an attractive nuisance for children, creating an unreasonable hazard in areas frequented by children including schools, parks, and other similar locations; and,

WHEREAS, the City Council further takes legislative notice that the United States Attorney General's four U.S. Attorneys in California announced with significant publicity an intensified campaign targeting the state's medical marijuana growers and distributors; and,

WHEREAS, the tension between state and federal laws governing marijuana has created confusion about what authority cities have regarding the regulation of medical marijuana; and,

WHEREAS, the City Council finds and determines that the enactment of this Ordinance is exempt from environmental review pursuant to California Environmental Quality Act Guidelines Section 15061(b)(3) in that there is nothing in this Ordinance or its implementation that could have a foreseeable significant effect on the environment.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BIGGS DOES ORDAIN AS FOLLOWS:

Section 1. The above-listed findings and statements of intent are true and correct.

Section 2. Delete section 6.05.210 of the Biggs Municipal Code.

Section 3. Section 6.25.030 of the Biggs Municipal Code is added as follows:

6.25.035 - Regulation of Location, Development, and Operation of Medical Marijuana Cultivation

A. Regulation of Location.

1. Medical Marijuana cultivation shall be prohibited on any parcel within the incorporated area of the City of Biggs except as an accessory use to a legally established residence within a legal accessory building on a legal parcel.

2. No Medical Marijuana cultivation is permitted within five hundred feet of any hospital, school, church, park or playground or in other areas where large numbers of minors regularly travel or congregate. The distance between any Medical Marijuana cultivation and any hospital, school, church, park or playground or other areas where large numbers of minors regularly travel or congregate shall be measured in a straight line, without regard to intervening structures, from the closest exterior wall of the detached accessory building in which the marijuana cultivation is occurring to the closest property line where the other building or activity is conducted.
3. Except as provided in Section 6.25.035(A)(4), Medical Marijuana cultivation may be undertaken only by a qualified patient who must occupy the residence on the parcel proposed for cultivation as their primary residence.
4. A qualified primary caregiver, as defined in Section 6.25.255, may undertake cultivation of Medical Marijuana on behalf of his/her qualified patient(s), but only in an accessory structure located on a parcel containing the primary caregiver's or qualified patient's primary residence.
5. Cultivation shall only be permitted in a detached accessory building and said cultivation area shall be limited to 50 square feet per parcel or residence, whichever is less. The cultivated marijuana may be used only by the qualified patient and not distributed, sold, given or transferred in any way to any other person or organization.
6. Outdoor cultivation shall be unlawful and a public nuisance for any person owning, leasing, occupying or having charge for possession of any parcel within any zoning district in the City of Biggs.
7. Indoor cultivation within a residence shall be unlawful and a public nuisance with regard to any person owning, leasing, occupying or having charge for possession of any parcel within any zoning district in the City of Biggs.

B. Development and Operational Standards.

1. From a public right-of-way, there shall be no exterior evidence of Medical Marijuana cultivation located inside an accessory building.
2. The qualified patient or primary caregiver shall reside in the residence located on the parcel containing the accessory structure where the Medical Marijuana cultivation occurs.

3. The qualified patient or primary caregiver shall not cultivate Medical Marijuana in any other location within the City of Biggs other than in the accessory structure located on the parcel containing his/her primary residence.
4. The qualifying residence located on the property containing the detached accessory building in which Medical Marijuana is cultivated shall maintain kitchen, bathrooms, and primary bedrooms for their intended use and shall not be used for Medical Marijuana cultivation.
5. Medical Marijuana cultivation shall not adversely affect the health or safety of nearby residents by creating dust, glare, heat, noise, noxious gasses, odor, smoke, traffic, vibration, or other impacts, or be hazardous due to use or storage of materials, processes, products or wastes.
6. Residential accessory structures used for cultivation shall meet the following criteria:
 - a. The building shall be provided with locking doors and have a working security system. The alarm shall be a standard audible residential alarm of at least 90 dBA but not exceeding 110 dBA.
 - d. The structure shall be located in the rear yard portion of the lot and shall, to the extent physically possible, maintain a minimum of a ten (10) foot setback from the side and rear property lines and from any other building on the parcel.
 - e. Any accessory structure, of any size, utilized for cultivation of marijuana shall be legally constructed with a building permit to the extent required. All electrical and plumbing shall be installed with a valid electrical and plumbing permit from the City. Such building permits will only be issued to the owner of the property. If the resident is proposing to convert an existing accessory structure for cultivation of marijuana, an inspection will be required to ensure compliance with the ordinance.
 - f. Medical Marijuana cultivation lighting shall not exceed 1200 watts and shall conform to all applicable codes.
 - g. Accessory structures utilized for cultivation shall be ventilated with odor control filters, and shall not create an odor, humidity or mold problem on the subject property or adjacent properties.
 - h. Other activities may occur within a detached accessory structure where medical marijuana is cultivated provided that the cultivation area itself within the structure does not exceed 50 square feet and

further provided that the cultivation area is segregated from all other building uses by permitted walls and all other conditions of this Section are satisfied.

7. Wherever Medical Marijuana is grown, a copy of a current and valid, State-issued Medical Marijuana card must be kept available to immediately present to City employees, including, but not limited to law enforcement officers, upon request.
8. Nothing in this Section shall be construed as a limitation on the City's authority to abate any nuisance which may exist from the planting, growing, harvesting, drying, processing or storage of marijuana plants or any part thereof from any location, indoor or outdoor, including from within a fully enclosed and secure building.

C. Accessory Buildings or Structures: Definitions and Criteria

1. Accessory building or structure.

“Accessory building or structure” means a building or structure detached from a principal building on the same lot and customarily incidental and subordinate to the principal building or use. An accessory building or structure may be erected only after the principal building or structure is established. See BMC 14.10.030.

2. Accessory building – Detached.

The following setback criteria shall apply to all detached nonresidential accessory buildings or structures:

- (1) Accessory buildings or structures shall comply with front yard requirements for primary dwellings.
- (2) The accessory building or structure shall comply with the following minimum side yard and rear yard setbacks, subject to meeting all Uniform Building Code requirements; provided, that if the lot abuts an alley, no rear yard setback shall be required.
- (3) The street-side setback of an accessory building or structure shall be no less than what is required by the zone district in which the building is located.
- (4) The accessory building or structure may be connected to the main building with a breezeway.

- (5) Accessory buildings or structures shall be located no closer than six feet to any other building.
- (6) Swimming pools may be constructed no closer than five feet to any side or rear property line and no closer than 10 feet to any residential structure.
- (7) Shade structures may be constructed no closer than five feet to any side or rear property line. See BMC 14.60.040.

D. Medical Marijuana Cultivation Location, Development, and Operation Information

In order to best effect the provisions of this section, city staff shall, to the fullest extent possible, jointly utilize Medical Marijuana cultivation location, development and operation information.

Section 4. Sections 6.05.235 and 6.05.240 of the Biggs Municipal Code are added as follows:

6.05.235 "Marijuana" shall have the same meaning as that set forth in California Health and Safety Code Section 11018.

6.05.240 "Medical Marijuana" means medical marijuana that has been recommended by a licensed physician in strict accordance with California Health and Safety Code Sections 11362.5 through Section 11362.83, inclusive, commonly referred to as the Compassionate Use Act and the Medical Marijuana Program.

Section 5. Amend section 6.25.020 of the Biggs Municipal Code as follows:

6.25.020 Unlawful property nuisance – Private property.

It shall be unlawful for any person owning, leasing, renting, occupying or having charge or possession of private property in the city to maintain or to allow to be maintained such property in such manner that any of the following conditions which are visible from a public street or right-of-way and/or are found to exist thereon, except as may be allowed by this code

- (1)(e) Outdoor cultivation of mMarijuana plants., the cultivation of which is visible from a public street or right-ofway or neighboring property, or the odor of which is detectable from a public street, right-of-way or neighboring property.
- (9) Medical Marijuana plants, products and/or the cultivation of Medical Marijuana, either visible to the public or neighboring property, or to permit the odor of which is detected by any member of the public, or to

~~cultivate, process or store Medical Marijuana not in compliance with all of the provisions of section 6.25.035. Cultivation of Marijuana. The cultivation and/or storage of marijuana within the city of Biggs is hereby declared to be unlawful and a public nuisance; provided, however, that a qualified patient or primary caregiver may cultivate and/or store marijuana but only if such storage and/or cultivation is confined and limited to and within a fully enclosed and secured structure.~~

Section 6. Amend section 6.25.055 of the Biggs Municipal Code as follows:

6.25.055 Nuisance abatement – Visible/unsecured odiferous Medical Marijuana Marijuana under cultivation.

(1) Medical Marijuana Cultivation/Storage Nuisance Circumstances.

Notwithstanding any provision in this chapter, the abatement measures set forth in subsection (2) of this section shall be utilized in the following nuisance circumstances: Medical Marijuana marijuana plants, or the cultivation of Medical Marijuana marijuana plants, visible from the street or neighboring property; the odor of Medical Marijuana marijuana detected from the street or neighboring property; or the presence, cultivation, processing and/or storage of Medical Marijuana marijuana, not in compliance with all of the provisions of section 6.25.035. except within a fully enclosed and secured structure.

Section 7. Add section 6.25.080(9) to the Biggs Municipal Code as follows:

6.25.080 Nuisance abatement lien (Gov. Code Section 38773.1).

(9) In any action, administrative proceeding or special proceeding to abate a nuisance in which the city elects, at the initiation of the action or proceeding, to seek recovery of its attorneys' fees, the prevailing party in the action or proceeding shall recover its attorneys' fees incurred in the action or proceeding. In no action, administrative proceeding or special proceeding shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the city in the action or proceeding. "Prevailing party" shall not include a party who complies with a notice of violation issued by the city or an order in any action, administrative proceeding or special proceeding. Attorney fees shall include fees for the services of the city attorney or his or her assistant and deputies, calculated based on the effective hourly rate of such attorney.

Section 8. Amend section 6.25.085 of the Biggs Municipal Code as follows:

6.25.085 Nuisance abatement fines.

- (4) Issuance of Fines for Visible/~~Unsecured~~Odiferous and/or Non-Regulatory Compliant Medical Marijuana Cultivation.

Section 9. Severability.

If any section, subsection, phrase or clause of this Ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this and each section, subsection, phrase or clause thereof irrespective of the fact that any one or more sections, subsections, phrase or clauses be declared unconstitutional on their face or as applied.

Section 10. Effect

This Ordinance shall take effect thirty (30) days after passage and approval by the City Council.

Section 11. City Clerk

The City Clerk is directed to prepare and have published a summary of this Ordinance no less than five days prior to the consideration of its adoption and again within 15 days following adoption indicating votes cast.

I HEREBY CERTIFY that the above and foregoing Ordinance was introduced on the 19th day of March, 2012, and was passed and adopted by the City Council of the City of Biggs at a regular meeting thereof duly held on the _____ day of _____, 2012, by the following vote, to wit:

AYES: COUNCILMEMBER: _____

NOES: COUNCILMEMBER: _____

ABSENT: COUNCILMEMBER: _____

ABSTAIN: COUNCILMEMBER: _____

ATTEST:

APPROVED:

Roben Dewsnap
CITY CLERK

Roger L. Frith
MAYOR